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In the

Supreme Court of the United States

No. 812

ROBERT C. HEMPHILL and MAXINE C. HEMPHILL, his wife, d/b/a CAPITOL SKATELAND, *Appellants,*

vs.

WASHINGTON STATE TAX COMMISSION, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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THE ARGUS PRESS, SEATTLE, WASHINGTON

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In the

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court for the State of Washington in an opinion filed March 18, 1965, that reversed the trial court, the Superior Court for Thurston County, State of Washington, and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinion Below

The opinion appealed from is reported in 65 W.D.2d 862, 400 P.2d 297.

The oral opinion of the Superior Court for Thurston County, State of Washington, together with its Findings of Fact, Conclusions of Law, and Judgment are

attached hereto as Appendix A. The decision appealed from is also reproduced in Appendix A.

Jurisdiction

This suit questions the constitutionality of a 1961 amendment to the Washington State sales tax statutes. After a favorable ruling in the trial court, the Washington State Supreme Court reversed the ruling of the lower court in an opinion filed March 18, 1965, and which became the final judgment of that court on June 10, 1965, when the present appellants' petition for rehearing was denied. Appellants filed a Notice of Appeal to the Supreme Court of the United States on July 29, 1965. Thereafter, pursuant to Rule 13 (2), Supreme Court Rules, 28 USCA, the Supreme Court of the State of Washington extended the time for filing this Jurisdictional Statement until December 15, 1965, by an order signed by the Chief Justice of the Supreme Court of the State of Washington on October 25, 1965.

Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 USC 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal in this case: *Home Ins. Co. v. Augusta,* 93 US 116, 23 L.Ed. 825 (1876); *Western Turf Assn. v. Greenberg,* 204 US 359, 51 L.Ed. 520, 27 S.Ct. 384 (1907); *Charleston Fed. Sav. & Loan Assn. v. Alderson,* 324 U.S. 182, 89 L.Ed. 857, 65 S.Ct. 624 (1945), rehearing denied, 324 US 888, 89 L.Ed. 1436, 65 S.Ct. 863.

Question Presented

Is there such a constitutionally meaningful distinction between the business of bowling and "amusement and recreation" businesses within the contemplation of a state statute which imposes a retail sales tax on admission fees to all amusement and recreation businesses "except bowling" that a court can conceive of a valid reason for the classification without evidential support?

Statutes Involved

Sections 82.04.050 and 82.04.250 of the *Revised Code of Washington* are set forth in Appendix B hereto.

STATEMENT OF THE CASE

Appellants own and operate "Capitol Skateland," a roller skating rink in Olympia, Washington. The Washington State legislature by chapter 24, § 1, Laws of 1961, Extra. Sess. *(RCW 82.04.050)* amended the definition of a "retail sale" upon which a sales tax was collectible to include the admission fees received by persons engaged in amusement and recreation businesses, which definition specifically includes skating and specifically excludes bowling. The same statute also specifically includes golf, pool, billiards, skating, ski lifts and tows. By interpretitive ruling, the State Tax Commission has construed the statute to also embrace golf driving ranges, miniature golf, shuffle board, swimming facilities, trampolines, charter boat rentals, tennis facilities, dancing, badminton, croquet, handball

courts, and private fishing. Administrative Ruling No. 16, Vol X, AR No. 16. See Appendix A, Statement of Facts.

Appellants paid the State of Washington sums representing the tax collectible on admission fees charged by them for the second half of 1961 and the first quarter of 1962. Appellants thereafter refused to collect or pay the tax, and in November of 1962 they petitioned the Washington State Tax Commission for a refund of the amounts previously paid. Their petition was denied by the Tax Commission on January 8, 1963. On January 11, 1963, appellants filed a notice of appeal from the order of the Tax Commission to the Superior Court for Thurston County, State of Washington.

The assertion by appellants that the 1961 retail sales tax amendment abridged the Equal Protection Clause of the *United States Constitution* was first raised in the Superior Court for Thurston County, State of Washington, by a motion for summary judgment. The court decided that both sides should put on evidence and so the motion was denied. The matter proceeded to trial and appellants submitted evidence tending to show the unreasonableness and illusory character of any distinction between a class of businesses engaged in amusement and recreation enterprises and a class of business engaged in bowling enterprises. St. 9; 17; 23; 27.

No explanation for the apparent discrimination was offered by the state, and it rested its case with less tes-

timony than could fill 4 pages of the Statement of Facts (St. 50-54) none of which was explanatory of the question before the court, the reasonableness of the classification.

Thus the trial court, the Superior Court of Thurston County, State of Washington, rendered an oral opinion striking down that portion of the sales tax statute as unconstitutional. He held,

> "Under the classification which the legislature has laid down, there is not only no reasonable grounds but any conceivable ground logically to make any distinction . . . It is held that the language which I have quoted last from Chapter 24, Section 1 of the Amendatory Act in the Laws of Extraordinary Session of 1961, offends . . . the equal protection clause of the 14th Amendment of the United States Constitution."

Written Findings of Fact, Conclusions of Law and Judgment were entered by the court supportive of this ruling (Appendix A).

Thereafer, the Washington State Tax Commission appealed the Superior Court's decision to the Supreme Court of the State of Washington. The State Supreme Court in its formal written opinion compared bowling with skating, found a difference and, with three judges dissenting, upheld the constitutionality of the tax.

The Question Is Substantial

This suit was commenced and brought on for trial in the Superior Court of the State of Washington for Thurston County on the basis that Section 82.04.050 of

the *Revised Code of Washington* was repugnant to the Equal Protection Clause of the 14th Amendment of the *United States Constitution.* The decision of the trial court and the Supreme Court, from which this appeal is taken, was decided on the constitutional question. The ruling of the Washington State Supreme Court states that the test for determining the equality of classifications under the Equal Protection Clause of the 14th Amendment of the *U.S. Constitution* is whether a court can conceive of any state of facts that would sustain the classification. The court "conceived" of a distinction between amusement and recreation businesses and bowling in the following manner:

> "We note that bowling requires a high initial capitalization; that it is a wholesome family sport, actively participated in by both male and female, young and adult; that its rates are fairly expensive; and that it is often located in or close to local neighborhoods, and that it is a sport requiring skill."

The above-quoted "differences" between bowling and other amusement and recreation businesses relied upon by the Washington State Supreme Court could more accurately be denominated "similarities." The differences found by the court raise a serious question concerning the fairness of excluding bowling from taxation on account of those "differences." The absence of a reasonable basis for the distinction, together with the ruling of the Washington State Supreme Court upholding its validity on the Equal Protection Clause of

the *U.S. Constitution,* raises a substantial question which merits review by appeal under the provisions of 28 *USC* 1257 (2). The question presented is of substantial public importance because the principle involved must be resolved to insure constitutional equality in state taxation.

(1) The Imposition of Special Burdens or the Granting of Special Benefits Must Always Be Justified

This fundamental principle of Equal Protection was first expounded and applied in the area of state taxation in *Bell's Gap Ry. Co. v. Pennsylvania,* 134 U.S. 232, 23 L.Ed. 892, 10 S.Ct. 533 (1889). Any concept of fairness would make it equally applicable today. In the trial of this case the Tax Commission made no attempt to justify the special benefit extended to bowling, nor did it offer any reasonable basis for imposing the tax on appellants in view of the special treatment of bowling.

(2) The Justification for a State's Classifying Subjects of Taxation and Excluding Some of the Classes from the Imposition of a Tax Must Be Found in the Inherent Reasonableness of the Classification

There must be some reason for using any particular difference as the basis of distinction. *Ohio Oil Co. v. Conway,* 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310 (1929). Various reasons may legitimately be propounded to justify apparently weak distinctions. For example, many otherwise invalid distinctions may be made for the purpose of encouraging and nurturing needed and

useful industries within a state. *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1958). So also will reasonable inequity be allowed where Sunday Closing Laws discriminate in favor or against different types of similar businesses if the desired result is the "enhancement of the recreational atmosphere of the day. *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101, 81 S.Ct. 1153, 81 S.Ct. 1218 (1960). Furthermore, where a virtual monopoly is the privilege of a particular enterprise, the favored business has no grounds upon which to complain of different and more rigid treatment than that indulged other businesses. *Rapid Transit Corp. v. New York,* 303 U.S. 573, 82 L.Ed. 1024, 58 S.Ct. 721 (1938).

In *State Board of Tax Commissioners v. Jackson,* 283 U.S. 527, 75 L.Ed. 670, 51 S.Ct. 540, 73 ALR 1464 (1931), this court summarized cases to illustrate the sometimes weak reasons capable of sustaining a classification. That case upheld a distinction between chain stores and smaller independent stores. However, the *Jackson* case and all the cases cited therein had a coherent reason for classifying into different categories palpably similar businesses and products. Moreover, in *Jackson* the court stated:

> "The appellants produced evidence to prove that there are many points of difference between chain stores and independently owned units."

The justification for unequal treatment has not flowed from the fertility of judicial imagination, but bottoms

on real circumstances and apparent reasoning. Appellants submit that the distinction made by the State Supreme Court below cannot stand the test of reason. If the reason given in the written decision below is sufficient, then there need not be any reason to sustain like distinctions in the future.

(3) Classifications Should Be Required To Be Based on Something Having a Relation to the Purpose for Which the Classification Is Made

Airway Corp. v. Day, 266 U.S. 71, 69 L.Ed. 169; 45 S.Ct. 12 (1924); *F. S. Royster Guano Co. v. Virginia,* 253 U.S. 412. If the purpose of *RCW 82.04.250* and *82.04.050* is to raise revenue, their exclusion of bowling does not reasonably relate to that purpose. If the purpose is to tax only inexpensive and unwholesome amusements and recreations, the distinction is obviously unfair and discriminatory.

(4) A Discriminatory Tax Law Cannot Be Sustained Against the Complaint of a Party Aggrieved If the Classification Appears To Be Altogether Illusory

F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 *(supra).* Any classification of "bowling" separate from "amusement and recreation businesses" is purely illusory, because it is based on distinctions without any real or reasonable differences. All the involved amusements and recreations are equally wholesome and expensive as bowling.

Fair taxation principles and the necessity of future guidelines arising out of the Equal Protection Clause

of the *U.S. Constitution* require a resolution of this question. Appellants submit that the question presented is so substantial that it requires plenary consideration with briefs on the merits and oral argument for its resolution.

Respectfully submitted,

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PATRICK W. CROWLEY
CHARLES R. LONERGAN, JR.
Attorneys for Appellants.

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

ROBERT C. HEMPHILL and MAXINE G. HEMPHILL, his wife, d/b/a CAPITOL SKATELAND, *Petitioners*, vs. THE WASHINGTON STATE TAX COMMISSION, *Respondent*.	No. 34479

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on duly and regularly before the undersigned Judge of the above-entitled Court for trial on the 24th day of September, 1963, the Petitioners appearing personally and by and through Corbett, Siderius & Lonergan and C. R. Lonergan, Jr., their attorneys, the Respondent apeparing through John J. O'Connell and T. R. Malone, its attorneys, witnesses having been sworn and testified, evidence having been taken and exhibits received, the court having heard the testimony and considered the evidence and being fully advised in the premises, makes the following

FINDINGS OF FACT

I.

The Petitioners, ROBERT C. HEMPHILL and MAXINE G. HEMPHILL, operate the roller skating rink in Olympia, Washington, as a sole proprietorship known as "CAPITOL SKATELAND."

II.

Pursuant to assessments made by the Excise Tax Di-

vision of the State Tax Commission of the State of Washington, the Petitioners paid taxes on admission charges paid by the general public in patronizing the Capitol Skateland for the privilege of roller skating on the petitioners' premises as follows:

> For the 1st Quarter of 1962, the petitioners paid the sum of $113.00; for the th Quarter of 1961, petitioners paid the sum of $144.01; for the 3rd Quarter of 1961, petitioners paid the sum of $57.24.

All of the sums paid by the Petitioners referred to in the preceding paragraph were paid for personally by the Petitioners and not paid for by the members of the general public patronizing the Petitioners' Skateland, the Petitioners not knowing that they were required to collect such tax at the time of said admissions during said periods. Thereafter, when advised that they should have collected said sums by the agent of the Washington State Tax Commission, Petitioners paid said sums from their personal resources, based upon the admission charged paid to them in said quarters.

III.

On or about November 27, 1962, and within two years from the time of the payment of said taxes referred to in the preceding Paragraph II, Petitioners filed a Petition for Hearing in Correction of Taxes Paid and for a Refund before the Washington State Tax Commission. On or about January 8, 1963, the Washington State Tax Commission denied Petitioners a Petition for Refund. Petitioners thereafter filed Notice of Ap-

peal and served the same on the Washington State Tax Commission within the times and within the manner provided by law.

IV.

The business of the Capitol Skateland operated by the Petitioners, consists of the charging of a price for the license to use the premises of the *Petitioners*. The premises of the Petitioners for which Petitioners used by individuals equipped with a devised known as charge admission, consists of a large building with a floor specially constructed for the purpose of being used by individuals equipped with a device known as a roller skate which is worn like a shoe and is fitted with four wheels. An admission price is paid by individual members of the public to the Petitioners for the purpose of using said floor. Members of the general public perform certain types of physical action on roller skates on Petitioners' floor consisting of skating around to music and other physical gyrations such as jumping, twirling and dancing, all to the accompaniment of music furnished by Petitioners. In addition, on the premises the Petitioners rent and sell equipment for the purpose of roller skating and accessories thereto, and sell food and beverages. Petitioners also have instructors in the art of roller skating and receive compensation from members of the public for instruction. Roller skating is a form of athletic activity which has various degrees of proficiency and is commonly engaged in, either individually or in competition.

V.

There are operated for a profit in this State, the following businesses: Golf, pool, billiards, skating, ski lifts and tows, boating, golf driving ranges, miniature golf, shuffleboard, swimming facilities, trampolines, charter boat rentals, tennis facilities, dancing facilities, badminton facilities, croquet facilities, handball courts, private fishing and bowling.

VI.

All of the foregoing activities in the preceding paragraph are recreational sports in which the participant physically engages in the particular activity. The business connected with each of the foregoing participation sports, consists in the charging of a fee for the admission to use the facilities owned by the business operator and a license is given in exchange for a fee to use said facilities. In conjunction with these businesses and the license given in exchange for a fee, each business commonly also involves the sale or rental of equipment necessary or desirable to be used in said recreation and the sale of food and beverages.

VII.

In addition to the recreation businesses of golf, pool, billiards, skating, ski lifts and tows, upon which a tax isimposed by *RCW 82.04.050,* the Respondent, Washington State Tax Commission, has imposed a tax on the admissions in the following recreation businesses: Boating, golf driving ranges, miniature golf, shuffleboard,

swimming facilities, trampolines, charter boat rentals, tennis facilities, dancing facilities, badminton facilities, croquet facilities, handball courts and private fishing facilities. The taxes on the foregoing businesses are imposed by an administrative interpretation of Section 1, Chapter 24, Laws of 1961, which said administrative interpretation appears as Petitioners' Exhibit No. 1, and is hereby incorporated in these Findings of Fact by this reference.

DONE in Open Court this 15th day of January, 1964.

/s/ RAYMOND W. CLIFFORD
Judge

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter of this action.

II.

The exemption from the taxation of bowling from the provisions of *RCW 82.04.050*, Section 1, Chapter 24, Laws of 1961, first extraordinary session violates the provisions of the 14th Amendment of the United States Constitution, and specifically the equal protection clause thereof, and Article 1, Section 12, Washington State Constitution, and particularly the equal privileges and immunities provision thereof, in that the separate legislative classification given to bowling from the other business activities denominated therein has no

reasonable relation to the object of said *RCW 82.04.050.* No reasonable ground exists for making a distinction between the class of amusement and recreation businesses, consisting of golf, pool, billiards, skating, ski lifts and tows, as enumerated in *RCW 82.04.050,* which are subject to the tax contemplated by the that statute on the one hand and bowling which is set up as a separate class in said statute and which is not taxed by said contemplation of said statute. Further, no reasonable ground exists for making a distinction between the amusement and recreation activities classified in the administrative interpretation of Section 1, Chapter 24, Laws of 1961 (Petitioners' Exhibit 1 herein incorporated by reference) admission charges to which businesses are taxed, and the separate classification of bowling which is not taxed.

III.

RCW 82.04.050, (Sec. 1, Chapt. 24, Laws of 1961 1st Ex. Ses.) does not apply alike to all persons within the designated class, to-wit: Amusement and recreation businesses, in that said statute exempts from said classification the business of bowling. Said exemption in favor of the business of bowling constitutes the grant of a special privilege to said industry which privilege is denied to other amusement and recreation businesses, with no reasonable basis for making such exemption or distinction.

IV.

The following portion of Section 1, Chapt. 24, Laws

of 1961, 1st extraordinary session, violates the 14th Amendment to the United States Constitution and Article 1, Section 12, Washington Constitution and is therefore void and of no effect "Amusement and Recreation businesses, including but not limited to golf, pool, billiards, skating, ski lifts and tows and others, but excluding bowling."

V.

The Petitioners are entitled to judgment against the Respondent in the sum of $314.25.

VI.

DONE in Open Court this 15th day of January, 1964.

/s/ RAYMOND W. CLIFFORD,
Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

ROBERT C. HEMPHILL and MAXINE G. HEMPHILL, his wife, d/b/a CAPITOL SKATELAND, *Petitioners,*

vs.

THE WASHINGTON STATE TAX COMMISSION, *Respondent.*

No. 34479

JUDGMENT

This matter having come on duly and regularly for trial before the undersigned Judge of the above-entitled Court, Petitioners appearing through Corbett, Siderius & Lonergan and C. R. Lonergan, Jr., their attorneys,

the Respondent appearing through John J. O'Connell and Timothy R. Malone, its attorneys, the Court having received exhibits, evidence and testimony and having duly considered the same, and having made and entered its Findings of Fact and Conclusions of Law, and being duly advised in the premises; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the following portion of *RCW 82.04.050* (Sec. 1, Chapter 24, Laws of 1961) is unconstitutional:

> "Amusement and Recreation businesses, including but not limited to golf, pool, billiards, skating, ski lifts and tows and others, but excluding bowling."

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petitioners have and recover judgment against the Respondent for the sum of $314.25, together with their costs and disbursements herein to be taxed by the Clerk of Court.

DONE in Open Court this 15th day of January, 1964.

/s/ RAYMOND W. CLIFFORD,
Judge

COURT'S ORAL DECISION

(Respective counsel having submitted briefs and made oral arguments to the Court, the Court rendered the following oral decision:)

THE COURT: In this case the Petitioners doing busi-

ness as Capitol Skateland were assessed and paid taxes on their amusement and recreation business and they paid that tax and they now seek to recover it.

A more explicit statement of the facts can be found in the pleadings and in the stipulation that is a part of the record. I am referring now to the written stipulation because certain oral stipulations have also been made in the record on the hearing here.

The statutory provisions which are in question are contained in an amendatory act passed at the Extra Ordinary Session of 1961 which amendatory act is Chapter 24, and the particular language which is the subject of controversy is found in Section 1 of that amendatory act.

Now, there are two matters which have been contained in the contentions of the parties and not been referred to here, and I suppose I should dispose of those first in order to clear the grounds which are apparently the only ones insisted on at the present time.

This statutory language contained in the amendatory staute contains this language which is a part of other language which we will refer to later. Now, I quote: "And excluding admission charges which may be subject to county or city admission taxes levied under authority granted in R.C.W. 35.21.280 or Chapter 36.38 R.C.W."

The State has made the contention that is a valid exception and I believe that the taxpayer took the

opposite view, but at any rate a discussion of that language would be purely academic. In the first place, I believe it is admitted here, it is my understanding of the proof, that there is no such county or city admission taxes involved in the case at bar. The Petitioners have not paid any such tax and the only question that could possibly arise under that language what indirectly, if any, it might have on the case at bar, and there are not facts in the record which would enable the Court to explore that. So the matter is purely academic at this time and the Court expresses no opinion with regard to that.

By a memorandum filed with the Court today the State contends that the Petitioners have no right to a refund because of the peculiar circumstances involving the payment of this tax. Generally speaking, the burden under the excise tax laws of the State of Washington is placed upon the seller, whether he sells services, or commodities, or whatever it may be, to collect the tax in addition to the price which he charges, and in the case at bar that was not done in the first instance. The factual situation is that through inadvertance or lack of familiarity with the law the taxpayer made the payment and the remittance out of their own funds instead of coming from a collection made from the users of the services. I have a number of provisions of excise tax laws that have been cited to me which would impose a penalty upon the taxpayer of the sort claimed here if he does not collect the tax from the one who pays

him for the services, or for the commodities which he sold. That would be tantamount to a forfeiture of the money that has been paid for that specific reason. And I find no support for that in the statutes.

The State cites one case or rather an annotation A.L.R. and some additional cases which tend in that direction, whatever the law may be elsewhere, there is no support for such a holding in this State, and I would decline such a forfeiture as in effect that would be a holding that the Petitioners had no right to recover a tax which they had paid simply because they in the first instance paid it out of their own funds and later corrected, as the facts show, their procedure and since that time have been collecting it from those paying for services and admissions and remitting those amounts to the State Tax Commission.

Now, we come to the real meat of this situation and it is this. The taxpayer challenges some language in the amendatory statute which I am about to quote from and it does so upon two grounds: That it is a violation of the privileges and immunities provision of Article I, Section 12 of the Constitution of the State of Washington and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Now, the specific language upon which this determination depends, as I said before, is found in Chapter 24, Laws of the Extra Ordinary Session of 1961, and omitting some language which is not pertinent to our

inquiry reads as follows: "The term 'sale at retail' or 'retail sale' shall include . . . admission, and other service emoluments however designated, received by persons engaging in the following business activities: (a) Amusements and recreational businesses including but not limited to golf, pool, billiards, skating, ski lifts and tows and others but excluding bowling . . . "

The as shown by Plaintiffs' Exhibit 1 in evidence the Tax Commsision adopted a definition which intended I suppose to implement the statute and they imposed a tax on the following additional amusements and recreational aetivities: "Golf driving ranges, miniature golf, shuffleboard, swimming facilities, trampolines, charter boat rentals, tennis facilities, dancing, badminton, croquet, and handball courts and private fishing."

Now, notice in the Exhibit 1 that they again go back to the statute and in implementing the statute they use substantially the same language to designate the classifications as contained in the statute, and in their rule of implementation they describe the activities which they are going to include and tax as amusements and recreational activities; and the language in the statute which I have previously read is "Amusements and Recreational Businesses."

Now, the State invites use to regard bowling as a separate class; in other words, they say to use that the combined effect of the rule which I have read into the record, a portion of it—and the statutory language is

to create two classifications: Amusements and recreational businesses; and bowling.

The statutory language and even their own rule will not admit of any such argument at all. We have listened to considerable proof on this subject and there is no substantial or significant difference between bowling and the other activities which have been classified as Amusements and Recreational Businesses. One would be hard put to find any reasonable or logical basis for any distinction and, of course, the cases cited are very plain and I am quoting now from the case of *State versus Inland Empire Refineries, Inc.*, 3 Washington (2d) 651, as follows: . . . "To comply with the equal protection clause of the Federal Constitution and the privileges and immunities clause of our State Constitution, legislation involving classification must apply alike to all persons within the designated class, and reasonable grounds must exist for making a distinction between those who are brought within the class and those who are excluded therefrom."

Under the classification which the legislature has laid down, there is not only no reasonable grounds but any conceivable ground logically to make any distinction. I am also connoissant and my attention is called to later cases, but the language from the Inland Empire Case which I have quoted appears in other later cases and is the classic rule which our Supreme Court has applied in cases of this sort to determine whether the legislature

has been within bounds in stating a classification and then departing from it.

It is held that the language which I have quoted last from Chapter 24, Section 1 of the amendatory act in the laws of Extra Ordinary Session of 1961, offends both the privileges and immunities of Article I, Section 12 of the State Constitution and also the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Now, that leaves one other matter for disposition to which I proceed. The State urges me to dispose of this matter by simply making the judgment apply to a very brief portion of the quoted language, I suppose it would be language "but excluding bowling." That the Court is not privileges to do, that would be a species of judicial legislation, that imposes a tax on activities where no tax existed before. It is true, of course, that if you find unconstitutional a portion of the tax under the severability clause, you would in a very real sense defeat the intent of teh legislature because it intended to tax, but it certainly didn't intend that by the elimination of the exception the Court could tax something which the legislature expressly declined to tax by reason of the exception. So the two situations are distinguishable, and the result is from our conception of the proper disposition of this matter that the following language is held to offend the provisions of the State and Federal Constitutions designated, and are therefore held to be unconstitutional, and I quote the lan-

guage and the only language which is affected by my decision (a) Amusement and Recreational Businesses including but not limited to golf, pool, billiards, skating, ski lifts and tows and others, but excluding bowling."

I think that disposes of everything and possibly some things that I know were not argued today, but I thought I should touch upon them so that a higher authority would not believe that I had overlooked them in any degree. The result is that the Petitioners will prevail, and you may submit appropriate findings, conclusions and decree at your convenience.

I take it it goes without saying that the severability clause which is Section 15 of this same Chapter 24 of the Laws of Extra Ordinary Session of 1961, is given application in the determination I have made. There is some difficulty in applying that language, but I still think that it should be applied and I have therefore done my best to accomplish what I believe to be the correct disposition of the matter.

ADMINISTRATION RULING—EXCISE TAX DIVISION
Vol. X, AR No. 16

Tax Commission of the State of Washington

A. *Amusements and Recreational Businesses.*

Since the law does not define the terms amusement and recreation business, they are presumably to be interpreted in their plain and ordinary meaning. However, the legislature has indicated the type of amuse-

ment and recreational businesses it intended to tax, i.e., golf, pool, billiards, skating, ski lifts and tows, and accordingly the Tax Commission construes the legislature's language of this classification as requiring taxation for sales tax purposes of all admission fees, charges, rents or emoluments, however designated, on the following additional amusement and recreational activities:

golf driving ranges
miniature golf
shuffle board
swimming facilities
trampolines
charter boat rentals
tennis facilities
dancing
badminton, croquet, and handball courts
private fishing

The legislature has specifically exempted any of those activities which are subject to county or city admissions taxes. Also exempted are charges for bowling.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT C. HEMPHILL and MAXINE G. HEMPHILL, his wife, d/b/a CAPITOL SKATELAND, *Respondents*,

vs.

THE WASHINGTON STATE TAX COMMISSION, *Appellant*.

No. 37584

EN BANC

Filed March 18, 1965

Robert and Maxine Hemphill, owners and operators of Capitol Skateland, instituted this suit, questioning the validity of 1961 amendments respecting the sales tax, RCW 82.04.250 and RCW 82.04.050. These amendmends applied the tax to the gross sales (admission fees) of skating rinks and othe recreational businesses, but excluded bowling alleys. The pertinent section of the 1961 amendatory tax statute reads:

> "The term 'sale at retail' or 'retail sale' shall include the sale of or charge made for personal, business or professional services, including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, reecived by persons engaging in the following business activities: (a) *amusement and recreation businesses* including but not limited to golf,

> pool, billiards, skating, ski lifts and tows and others *but excluding bowling* and excluding admission charges which may be subject to county or city admissions taxes levied under authority granted in RCW 35.21.280 or chapter 36.38 RCW; . . ." 1961 Ex. Sess. Laws ch 24, § 1. (Italics ours)

The Thurston County Superior Court ruled in favor of the Hemphills, holding that the whole of subsection (a) as quoted was null and void because the exemption granted to bowling was a denial of equal protection under the Fourteenth Amendment to the United States Constitution and the equal privilege and immunities provision of Art. I, § 12 of the Washington State Constitution.[1] The state has appealed the decision to this court.

A review of general statutory and constitutional principles should be helpful in setting the stage for decision herein. There is a strong presumption that a revenue statute is constitutional, and where there is doubt, it will be resolved in favor of constitutionality. *Gruen v. State Tax Comm.*, 35 Wn.(2d) 1, 6, 211 P. (2d) 651 (1949). Also, the general rule is that a legislature has the power to make *reasonable and natural classifications* for purposes of taxtion, and that in the exercise of this power the legislature has very broad

---

[1]This court has long held that the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal privilege and immunities provision of Art. I, § 12, of the Washington State Constitution are substantially identical. *State v. Hart*, 125 Wash. 520, 217 Pac. 45 (1923); *Texas Company v. Cohn*, 8 Wn.(2d) 360, 112 P.(2d) 522 (1941). Therefore, this opinion will henceforth not distinguish between the two sources of the controlling law.

discretion in making such classifications.[2] *Galvin v. State Tax Comm.*, 56 Wn.(2d) 362 (1960); *State v. Hi-Lo Foods, Inc.*, 62 Wn.(2d) 534, 383 P.(2d) 910 (1963). Since the legislative enactment is presumptively valid, the burden is upon the challenger to prove that a questioned classification does not rest upon a reasonable basis. *Madden v. Kentucky*, 309 U.S. 83, 88 (1939).

Even conceding that skating and bowling are both part of the "amusement and recreation" industry, we do not accept the respondent's argument that there are no differences between skating and bowling. As the Supreme Court has stated:

> "... it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment *if any state of facts reasonably can be conceived that would sustain it.*" *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 528 (1959). (Italics ours)

Thus, the test is merely whether "any state of facts reasonably can be conceived that would sustain" the

---

[2] It should be pointed out once again that there is a distinction between the power of the legislature to designate classes *for taxation and classes for regulation.* In the former, the legislature acts under its revenue power and is given very broad power in the determination of classes for the imposition of taxation, subject only to the requirement that the division between the classes rest on a basis in reason that is not arbitrary and capricious. In the second category, the legislature acts under its police power, and then the test becomes whether the classification bears a reasonable relationship to the ends sought by the act. This distinction is recognized and well discussed in *Texas Co. v. Cohn*, 8 Wn.(2d) 360, 375, 112 P.(2d) 522 (1941).

classification. We note that bowling requires a high initial capitalization; that it is a *wholesome family sport, actively participated in by both male and female, young and adult; that its rates are fairly expensive; and that it it is often located in or close to local neighborhoods, and that it is a sport requiring skill.* These factors combined with the special characteristics of the sport of bowling are sufficient to place it in a separate and distinct category. While the distinction between bowling and skating may be called "narrow," this is not fatal to the classification. *State v. Hi-Lo Foods, Inc.*, 62 Wn.(2d) 534, 541, 383 P.(2d) 910 (1963). Since there is a narrow distinction between skating and bowling, the exemption of bowling from the tax violates no equal protection principle as to the respondents-plaintiffs located within the skating rink classification.

The highly semantical nature of the respondent's argument can be seen when we consider the alternatives open to the legislature in this matter. The legislature could have imposed the tax alone on skating, or it could have made a long list of the different industries making up the "amusement and recreational businesses," omitting reference to the bowling industry. Since each field is different and requires different considerations, such a revenue act would have been upheld. As to the matter of the mechanics of legislative drafting, we can see no significant difference between legislative choice of the above format and the choice of the

challenged format, where in either instance one segment of a general industry classification is excluded or excepted from the impact of a tax statute. These applicable principles are of long standing:

> "... This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe con constitutional limitation. ...
>
> "Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would supoprt it." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 509 (1937).

Therefore, once it is determined that there is a reasonable basis for the distinction between the taxed class and the untaxed class, the language mechanics are no longer of controlling importance.

We are supported in our holding that there is a reasonably difference between the classes here by the authority of *Texas Co. v. Cohn, supra,* where this court upheld a tax on the distribution of fuel oil even though no such tax was imposed upon solid fuels.[3] The court there listed many differences between the types of fuel,

[3] The respondents relied on the case of *State v. Inland Empire Refineries, Inc.*, 3 Wn.(2d) 651, 101 P.(2d) 975, which in part held that an excise tax on distributors of fuel oil was a violation of equal protection of the law because there was no reasonable basis for classifying fuel oil separately from solid fuels. However, this part of the case was subsequently overruled by *Texas Co. v. Cohn*, 8 Wn.(2d) 360, 367, 112 P.(2d) 522 (1941).

any number of which would have supported the classification.

The respondents have strongly argued that their competition with the bowling industry for "amusement dollars" places them in the same class for taxation. This same argument was advanced in the *Texas Company* case, *supra,* and was rejected with the statement that ". . . this court has indicated that it does not regard competition as a circumstance of controlling significance." (See also, *Magnano Co. v. Hamilton,* 292 U.S. 40 (1934), where a Washington state statute which imposed a tax of fifteen cents per pound on butter substitutes was upheld, even though there was no tax on butter itself.) Thus we conclude that the mere fact of competition is not controlling if there are other characteristics that make a distinction between the classes reasonable.

We, therefore, hold that the legislature was within its proper discretion in excluding the bowling industry from the tax, as there is a reasonable basis on which to distinguish bowling from the other classes. The judgment of the trial court is reversed.

FINLEY, J.

We concur:

ROSELLINI, C. J.
OTT, J.
HUNTER, J.
HAMILTON, J.
HALE, J.

No. 37584

HILL, J. (dissenting—This dissent will be brief.

The Constitution of the State of Washington says:

> "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." Art. I, § 12.

RCW 82.04.050 makes the retail sales tax applicable on the amounts received,

> "... by persons engaging in the following business activities: (a) amusement and recreation businesses including but not limited to golf, pool, billiards, skating, ski lifts and tows and others but excluding bowling. ..."

It is urged that the exclusion of bowling is discriminatory and makes the tax unconstitutional.

Conceding wide discretion to the legislative power in the classification of trades, businesses, or occupations which may be subjected to an excise tax, the tests by which the constitutionality of such an exclusion must be determined are as follows: Is it arbitrary or capricious? Does it rest upon some reasonable consideration of difference or policy? *State v. Hi-Lo Foods, Inc.* (1963), 62 Wn(2d) 534, 383 P.(2d) 910; *State ex rel. Stiner v. Yelle* (1933), 174 Wash. 402, 25 P.(2d) 91.

The trial court, applying this test, concluded not only that there were "no reasonable grounds," but that there were no "conceivable grounds" which would justify

the exclusion of bowling from the tax. The trial court, therefore, held the tax to be unconstitutional.

The majority reverses the trial court and holds that there was a reasonable basis on which to distinguish bowling from the other sports and that, therefore, the tax is constitutional. The majority refers to a high initial capitalization; but even higher would be a ski lift or a golf club. Nor are we convinced that bowling surpasses the other taxed sports in wholesome family appeal, nor in skill—at least the skiers and golfers, and perhaps others, would disagree.

The exclusion of bowling from the tax seems to me to have no reasonable or logical basis; hence, I would affirm the trial court.

HILL, J.

We concur:

DONWORTH, J.

WEAVER, J.

APPENDIX B

Excise Taxes

82.04.250 Tax on retailers. Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one percent.

82.04.260 Tax on buyer and wholesale seller of grains —Flour manufacturers—Seafood products manufacturers. (1) Upon every person engaging within this state in the business of buying wheat, oats, corn and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of one one-hundredth of one percent.

(2) Upon every person engaging within this state in the business of manufacturing wheat into flour; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour manufactured, multiplied by the rate of one-eighth of one percent.

(3) Upon every person engaging within this state in the business of manufacturing seafood products which remain in a raw, raw frozen, or raw salted state at the completion of the manufacturing by that person; as to such persons the amount of tax with respect to such

business shall be equal to the value of the products manufactured, multiplied by the rate of one-eighth of one percent.

Chapter 82.04

Business and Occupation Tax

Withdrawal of gas from underground reservoir not deemed taking or producing under RCW 82.04.100: RCW 80.40.010.

82.04.030 "Person," "company." "Person" or "company," herein used interchangeably, means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, non-profit, or otherwise and the United States or any instrumentality thereof.

82.04.050 "Sale at retail," "retail sale." "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) other than a sale to one who (a) purchases for the purpose of resale as tangible personal property in the regular course of business, or (b) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes

an ingredient or component of such real or personal property, or (c) purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280, subsection (2), and 82.04.290.

The term "sale or retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, excluding, however, services rendered in respect to live animals, birds and insects; (b) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in

commercial farming or agriculture; (c) the sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; (d) the sale of or charge made for labor and services rendered in respect to automobile towing, armored car service and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16; (e) the sale of and charge made for the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same.

The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal, business or professional services, including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities: (a) amusement and recreation businesses including but not limited to golf, pool, billiards, skating, ski lifts and tows and others but excluding bowling and excluding admission charges which may be subject to county or city admissions taxes levied under authority granted in

RCW 35.21.280 or chapter 36.38; (b) abstract, title insurance and escrow businesses; (c) credit bureau businesses; (d) automobile parking and storage garage businesses.

The term shall also include the renting or leasing of tangible personal property to consumers.

The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any publicly owned street, place, road, highway, bridge, or trestle which is used or to be used primarily for foot or vehicular traffic, nor shall not include sales of feed, seed, fertilizer, and spray materials to persons for the purpose of producing for sale any agricultural product whatsoever, including milk, eggs, wool, fur, meat, honey, or other substances obtained from animals, birds, or insects.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1965

No. 812

ROBERT C. HEMPHILL and MAXINE C. HEMPHILL, his wife, d/b/a CAPITOL SKATELAND,

Appellants.

v.

WASHINGTON STATE TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Appellee moves to dismiss this appeal on the grounds that the appeal presents no substantial federal question.

QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution forbid a state to impose a sales tax upon admission fees for roller skating, when no sales tax is imposed upon charges for the sport of bowling?

STATUTES INVOLVED

The pertinent statutory provisions have been set out in Appendix B of the Jurisdictional Statement of Appellants. For convenience of this Court, we repeat the key statutory provision involved.

> "The term 'sale at retail' or 'retail sale' shall include the sale of or charge made for personal, business or professional services, including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities: (a) *amusement and recreation businesses* including but not limited to golf, pool, billiards, skating, ski lifts and tows and others *but excluding bowling* and excluding admission charges which may be subject to county or city admissions taxes levied under authority granted in RCW 35.21.280 or chapter 36.38 RCW; * * *" 1961 Ex. Ses. Laws, ch. 24, § 1. (Italics ours.)

ARGUMENT

The decision of the Washington State Supreme Court is clearly correct. A brief review of pertinent decisions of the United States Supreme Court confirms this.

The basic principle involved in this appeal has been stated by this Court as follows:

> "* * * it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment *if any*

state of facts reasonably can be conceived that would sustain it." Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959). (Italics ours.)

Of even more importance than the broad statement of this principle is its specific application by this Court.

In *Brown-Forman Co. v. Kentucky*, 217 U.S. 563 (1910), this Court held that Kentucky could impose a tax on the business of rectifying, compounding, or blending whiskey, even though no tax was imposed upon the making of straight whiskey. Certainly, by any conceivable criteria, the difference between bowling and skating is greater than the difference between blended and straight whiskey.

In *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922), this Court held that Pennsylvania could impose a tax upon anthracite coal, even though no tax was imposed upon bituminous coal. Certainly the differences between bowling and skating are more obvious and substantial than the differences between these two types of coal.

In *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934), this Court held that Washington could impose a tax of fifteen cents per pound on butter substitutes, even though no tax was imposed upon butter itself.

In view of these decisions, it is simply too late in the day for Appellants to contend that a state must either tax all forms of the amusement and recreation business or must tax none. A state may, under these

decisions, single out bowling in imposing a tax; and, by the same token, it may single out bowling in granting an exemption. "A legislature is not bound to tax every member of a class or none." *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495, at 509 (1937).

Moreover, it is difficult to understand how the question presented in this appeal is of such substantial significance outside the State of Washington as to merit plenary review by this Court. In fact, it is no longer of any continuing significance in the State of Washington itself. By section 1, chapter 173, Laws of 1965, Ex. Ses., the sales tax was imposed upon bowling, and the prior exclusion of bowling which gave rise to this case was deleted.

We submit, therefore, that this appeal presents no substantial federal question, and that the appeal should be dismissed.

Respectfully submitted,

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